Supreme Court, U.S.
FILED
OCT 25 2002
CLERK

(13)

No. 01-1444

IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

MARY E. ALEXANDER
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of
Trial Lawyers of America

JEFFREY L. NEEDLE*
Law Offices of Jeffrey Needle
119 First Ave. S.
Suite 200
Seattle, WA 98104-2533
(206) 447-1560
* *Counsel of Record*
Attorney for Amicus Curiae

BEST AVAILABLE COPY

30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

II. THE PURPOSE OF THE CIVIL RIGHTS ACT MILITATES AGAINST BROAD APPLICATION OF QUALIFIED IMMUNITY 5

II. THE APPLICATION OF QUALIFIED IMMUNITY HAS BECOME THE RULE AND NOT THE EXCEPTION. 14

III. BINDING PRECEDENT IN THE SUPREME COURT, LOCAL CIRCUIT COURT OF APPEALS OR DISTRICT COURT DETERMINES WHETHER CONSTITUTIONAL RIGHTS ARE CLEARLY ESTABLISHED 18

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....8, 9, 11, 16

Benson v. Allphin, 786 F.2d 268 (7th Cir.1986).....17

Brewster v. Board of Educ. of Lynwood Unified School Dist., 149 F.3d 971 (9th Cir. 1998).....17

Casteel v. Pieschek, 3 F.3d 1050 (7th Cir.1993).....17

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).....7

Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997).....7, 10

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992).....20, 23

Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989).....17

DiMeglio v. Haines, 45 F.3d 790 (4th Cir.1995).....17

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....8, 9, 11

Harper v. Campbell, 943 F.2d 51 (6th Cir. 1991).....19

Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997).....17

Hope v. Pelzer, 536 U.S. ___, 122 S.Ct. 2508, 153 L.Ed 2d 666 (2002).....16, 23

Imbler v. Pachtman, 424 U.S. 409 (1976).....7, 11

K.H. Through Murphy v. Morgan, 914 F.2d 846 (7th Cir.1990).....17

Kincade v. City of Blue Springs, 64 F.3d 389 (8th Cir.1995).....17

Melton v. City of Oklahoma, 879 F.2d 706, 731 (10th Cir. 1989).....15, 17

Mitchell v. Forsyth, 472 U.S. 511 (1985).....8, 16

Monell v. Dep't of Soc. Serv. of N.Y., 436 U.S. 658 (1978).....6, 7

Nixon v. Fitzgerald, 457 U.S. 731 (1982).....11

Norfleet v. Arkansas Dep't of Human Services, 989 F.2d 289 (8th Cir. 1993).....19

Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021 (5th Cir.1988).....17

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993).....17

Oregon v. Elstand, 470 U.S. 298 (1985).....22

Owen v. City of Independence, 445 U.S. 622 (1980).....6, 8, 13, 15

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).....6, 7

Pierson v. Ray, 386 U.S. 547 (1967).....8, 11

Quarles v. New York, 467 U.S. 469 (1984).....21

Saucier v. Katz, 533 U.S. 194 (2001).....8

Tenney v. Brandhove, 341 U.S. 367 (1951).....11

Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988).....15

United States v. Lanier, 520 U.S. 259 (1997).....16, 23

Voigt v. Savell, 70 F.3d 1552 (9th Cir. 1995).....17

Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).....15, 18

Wilson v. Layne, 526 U.S. 603 (1999).....19

Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988).....16

Wyatt v. Cole, 504 U.S. 158 (1992).....8

STATUTES

42 U.S.C. § 1983 ..... passim

Civil Rights Act of 1871, 17 Stat. 13.....5

OTHER AUTHORITIES

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987) 18

Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583 (1998) 10, 13

David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U.L. Rev. 641 (1994) 18

Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 Idaho L. Rev. 61 (1997) 12

Alfredo Garcia, *The Scope of Police Immunity From Civil Suite Under Title 42 U.S.C. Section 1983 and* Bivens: *A Realistic Appraisal*, 11 Whittier L. Rev. 511 (1989) ... 11

Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. Rev. 123 (1999) 11

Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 Harv. J. L. & Pub. Pol'y, 479 (1994). 9

Note, *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133 (1977) 13

David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23 (1989) ... 10

Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 Ariz. L. Rev. 621 (1993). 19

Stephen J. Shapiro, *Public Official's Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *And Its Progeny: A Critical Analysis*, 22 U. Mich. J. L. Ref. 249 (1989) 9

No. 01-1444

IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters of consent of the parties to the filing of this brief have been filed with the Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members

---

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

practicing around the country primarily represent individua! plaintiffs in civil actions.

Among those plaintiffs are persons whose constitutional rights have been violated by police or government agents. In ATLA's view, the availability of a private cause of action to vindicate constitutional rights is essential to insure that the government and its agents are held accountable to the rule of law. Without the power to hold the government and its agents accountable, individual rights are only theoretical. This accountability is a basic ingredient of a free society, serving both to deter future constitutional violations and to compensate the victims of governmental abuse of power. In the absence of municipal liability, the overbroad application of qualified immunity renders constitutional rights unenforceable.

SUMMARY OF THE ARGUMENT

Broad application of qualified immunity is inimical to the quality of constitutional freedoms and inconsistent with the remedial purpose of the Civil Rights Act, 42 U.S.C. § 1983. The enlightened method of protecting public officials from civil liability and undue interference with their public functions is to prevent the constitutional violations that give rise to litigation.

Prevention of constitutional violations requires that public officials be extremely knowledgeable of constitutional law as it relates to their public functions and respectful of the limits on their authority. Exposure to civil liability creates a strong incentive for government officials to be knowledgeable and respectful of constitutional rights. Qualified immunity has the contrary effect. The legal structure of qualified immunity rewards ignorance of constitutional rights. The lack of accountability causes public officials to

disregard the limitations on their lawful authority in the name of efficiency or complete indifference.

The broader the application of qualified immunity, the greater the cost to constitutional freedoms. The application of qualified immunity has now become so broad that it threatens to swallow the cause of action. A healthy respect for constitutional rights, however, mandates that vindication be the rule and not the exception.

Nothing better illustrates qualified immunity's exceptionally broad application in the lower courts than the Petitioner's arguments in this case. Any court adopting those arguments could dismiss virtually any constitutional claim for damages. The Petitioner raises the bar so high that only legal scholars can know whether constitutional rights are "clearly established." But if it would take a legal scholar to know that particular conduct violates clearly established constitutional rights, then only legal scholars could be held liable for damages under Section 1983. Police officers and public officials generally are not legal scholars, yet they must be held accountable to the rule of law and the victims of constitutional violations must be compensated for their injuries.

One of the most frequently cited justifications in defense of qualified immunity is that competent individuals will be less inclined to work in the public sector so long as there exists the potential for large judgments being returned against them individually. This justification is specious. Qualified immunity is unnecessary to protect public officials from civil liability. The overwhelming majority of municipalities have enacted indemnification ordinances and statutes. The notion that a public official will have to pay for a

civil rights judgment is generally false. The rule that *respondeat superior* does not apply to claims for constitutional violations under Section 1983 is nothing but a legal fiction. As a practical matter, the government always pays. It is not in the public interest to sacrifice the quality of constitutional freedoms in the name of protecting the government from civil liability.

A secondary justification is that civil litigation causes disruption to the efficient operation and traditional functions of government. But the constitutional right at issue already incorporates the balancing of values between efficiency and the quality of freedom. All constitutional rights embody a basic constitutional value that government efficiency is subordinate to the right of the individual to be free from government control. Qualified immunity obviates that basic constitutional value, seeks to re-balance the equities, and subordinates individual rights in the name of governmental efficiency. Moreover, the common law from which the immunity derives didn't protect police officers with this broad type of immunity. Only highly placed executive officials were protected.

The vindication of constitutional freedoms cannot be dependent upon nation-wide judicial unanimity, which rarely exists. The existence of controlling precedent in the Supreme Court, local circuit court of appeals or district courts is sufficient for constitutional rights to be clearly established for the purpose of imposing liability. Only in the absence of controlling precedent should other decisional law be considered. In this case, controlling Ninth Circuit precedent clearly established that the Petitioner's conduct violated Respondent's constitutional rights. The existence of a split in the circuits is irrelevant.

ARGUMENT

II. THE PURPOSE OF THE CIVIL RIGHTS ACT MILITATES AGAINST BROAD APPLICATION OF QUALIFIED IMMUNITY.

Title 42 U.S.C. § 1983 provides a cause of action against any "person" who, under color of law, deprives any other person of rights, privileges, or immunities secured by the Constitution or laws of the United States. As remedial legislation, Section 1983 is to be construed generously to further its primary purpose of preserving "human liberty and human rights" and to "provide remedies for their wrong to all people."

> Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13 -- the forerunner of § 1983 -- confirm the expansive sweep of the statutory [445 U.S. 636] language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:
>
> > I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provision authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again

> and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App) Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. *See Monell v. New York City Dept. of Social Services*, 436 U.S. at 683-687.

Owen v. City of Independence, 445 U.S. 622, 635-36 (1980).

The term "person" includes municipalities. *Monell v. Dep't of Soc. Serv. of N.Y.*, 436 U.S. 658, 694 (1978). Municipalities, however, cannot be held liable for constitutional torts under Section 1983 on a *respondeat superior* theory. They can only be held liable when the execution of a "municipality's policy or custom . . . inflicts the injury." *Id.* at 691, 694.[2] The

---

[2] "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (plurality). Municipal liability can be established in two ways: (1) by demonstrating that the decision-making official was, as a matter of state law, a final policymaking authority "whose edicts or acts may fairly be said to represent official policy" in the area of decision, *Monell*, 436 U.S. at 694; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality); *Pembaur*, 475 U.S. at 480-81; or (2) by showing that an official with final policy-making authority either delegated that authority to, or ratified the decision of, a subordinate. *Praprotnik*, 485 U.S. at 126-27; *Pembaur*, 475 U.S. at 483.

continued existence of different standards for individual liability and municipal liability and the inapplicability of *respondeat superior* have resulted in a bar to the vindication of constitutional rights that is at best difficult and often impossible to overcome. "*Monell's* basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply." *Commissioners of Bryan County v. Brown*, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting, joined by Justices Stevens and Ginsburg). "I believe that the legal prerequisites for reexamination of an interpretation of an important statute are present here. The soundness of the original principle is doubtful." *Id.* at 431. Because a municipal employer is not liable under *respondeat superior*, qualified immunity results in no liability, no accountability and no enforcement of constitutional rights.[3]

By its terms, 42 U.S.C. § 1983 "creates a species of tort liability that, on its face, admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Its language

---

[3] "The absence of any damages remedy for violations of all but the most 'clearly established' constitutional rights could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy, aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined." *Owen v. City of Independence, supra*, at 651 n.33 (citation omitted).

is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). Nevertheless, this Court recognizes qualified immunity which protects government officials from civil liability insofar as their conduct does not violate constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity not only protects public officials from civil liability; it also creates an immunity from suit. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The operation of the "clearly established" standard depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Qualified immunity does not apply to municipal liability. *Owen v. City of Independence, supra.*

The breadth of the qualified immunity now recognized differs substantially from the common law tort defense upon which it was originally justified. As originally contemplated, qualified immunity protected a police officer who acted with "good faith and probable cause" where the conduct was lawful at the time of the act, but later ruled to be unconstitutional.[4]

---

[4] In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that a law enforcement officer sued under Section 1983 would be entitled to immunity from liability if he arrested civil rights workers under state law that was later found to be unconstitutional but was valid at the time of the act. *Id.* at 557. In recognizing the availability of qualified immunity, the Court adhered to the existing common law tort defenses. *Id.* at 556-557. In *Wyatt v. Cole*, 504 U.S. 158 (1992), the Court recognized that the qualified immunity now recognized by the Court is very different than the original "good faith and probable cause" defense first stated in *Pierson*. *Id.* at 165-166. In *Wyatt*, Justice Kennedy opined that since the Court is interpreting a remedial statute, it does not have the freedom of action of a court interpreting common law and that "we may not transform what existed at common law based on the notions of policy or efficiency." *Id.* at 171-172 (Kennedy, J., concurring). *See also Anderson v. Creighton*, 483 U.S. 635, 645 (1987) ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law"); Stephen J. Shapiro, *Public Official's Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *And Its Progeny: A Critical Analysis*, 22 U. Mich. J. L. Ref. 249, 266-67 (1989).

The broad application of immunity articulated in *Harlow* was intended for highly placed executive officials and was never intended for police officers.[5] This expansion of the doctrine of qualified immunity represents the policy judgment that compensation for

---

[5] The suggestion that every law enforcement officer should be given the same measure of immunity as a Cabinet officer or a senior aide to the President of the United States is not compelling. Testifying in court is a routine part of an officer's job; his or her participation in litigation does not occasion nearly as great a disruption of everyday duties as it would with those of a senior government official. Moreover, the political constraints that deter high government officials from violating the Constitution have only slight, if any, application to police officers, and may actually lead to more, rather than less, vigorous enforcement activity. It is thus quite wrong simply to assume that the considerations that justified the decision in *Harlow v. Fitzgerald* also justify an equally broad rule of immunity for police officers.

Anderson, 483 U.S. at 661-62 (Stephens, J., dissenting). *See also* Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 Harv. J. L. & Pub. Pol'y, 479-519 (1994).

constitutional violations and the deterrence of unconstitutional conduct is subordinate to the governmental interest in effective and vigorous execution of governmental policies and programs. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 73-79 (1989).

One justification in defense of a broad application of qualified immunity is that competent individuals will be less inclined to work in the public sector so long as there exists the potential for large judgments being returned against them individually. This justification is without merit. Virtually every jurisdiction in the United States has an indemnification ordinance or statute which requires the government to indemnify its employees for any civil judgments caused by acts done within the scope of employment. *See Commissioners of Bryan County v. Brown*, 520 U.S. at 436 (Breyer, J., dissenting) (criticizing the majority for failing to consider that indemnification statutes "appear . . . in effect, [to] mimic *respondeat superior* by authorizing indemnification of employees" but conceding that "the [actual] pattern of indemnification: how often, and to what extent, States now indemnify their employees, and which of their employees they indemnify" remains unclear).[6] The notion that a public official will have to pay for a civil rights judgment is generally false. The rule of law that *respondeat superior* does not apply to claims for constitutional violations

---

[6] *See also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 586-88 (1998) (discussing and citing numerous secondary authorities on the issue of indemnification and the application of *respondeat superior* under Section 1983).

under Section 1983 is nothing but a legal fiction. As a practical matter, the government always pays.

A second rationale for qualified immunity claims that the "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (citations omitted).[7] In deference to this consideration, many classifications of officials are granted absolute immunity.[8] Many commentators argue that qualified immunity has become essentially indistinguishable from absolute immunity.[9] In any event, qualified

---

[7] The purpose of the defense of qualified immunity is to protect public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. at 806. *See also Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) ("One of the purposes of the . . . qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government'").

[8] *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (members of Congress); *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (President).

[9] *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. Rev. 123, 153 (1999) ("There is then a body of literature examining the discrepancy between what the qualified immunity defense was meant to accomplish and how it actually works. The defense does not protect defendants in a meaningful way. At the same time, it makes a judgment for the plaintiff almost impossible to obtain."); Alfredo Garcia, *The Scope of Police Immunity From Civil Suite Under Title 42 U.S.C. Section 1983 and* Bivens*: A Realistic Appraisal*, 11 Whittier L. Rev. 511, 534 (1989) ("[T]he individual citizen who seeks redress for a constitutional violation faces a formidable obstacle. That obstacle is the doctrine of qualified immunity for police officers as it had been developed by the United States Supreme Court."); Jonathan M. Freiman, *The Problem*

immunity was never intended to afford police officers the broad immunity now recognized. *See supra*, note 5.

The public interest mandates that the conduct of police officers be restrained by the limits of their lawful authority. Police officers and all public officials should always pause and consider whether their conduct violates constitutional rights.

> More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decision maker would be derelict in his duties if, at some point he did not consider whether his decision comports with constitutional mandates, and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it:
>
> > Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decision makers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'etre.

---

of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution, 34 Idaho L. Rev. 61, 68 (1997) ("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through.").

Owen, 445 U.S. at 656, quoting Note, *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1224 (1977).

It isn't easy to be a police officer in a free society. It isn't supposed to be easy. As compared to a totalitarian society, we hold police officers to a far higher standard of professionalism. Although legal scholarship is not required, we require police officers to be very knowledgeable in criminal procedure. We require that they know the difference between probable cause and reasonable suspicion; that they know what exigent circumstances are and when they may justify a search or arrest without a warrant; that they know when and how to use deadly force; when to pursue a fleeing motorist or give up the chase; that suspects have a right to remain silent; what constitutes coercion; and a host of other rules, regulations and policies effecting the rights of citizens and the limits of police authority. These are not legal technicalities, they are the ideals that distinguish this country as a free society, and make it worth living in.

We cannot expect police officers to possibly learn and retain all this information without adequate training. But municipalities must have an incentive to intensively train their officers, and the officers must have an incentive to learn and apply their knowledge to real life situations. Because qualified immunity defines liability in terms of what an objectively reasonable public official would know, police officers and government officials generally have an incentive to argue that their ignorance of constitutional rights is objectively reasonable. This incentive is simply not in the public interest. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583 (1998). In a different context, the lack of knowledge

defended by government attorneys as reasonable would often be an insult to the intelligence of any self respecting public official. The enlightened method to avoid constitutional litigation and liability is to avoid the violations of law that give rise to that litigation. Training and respect for constitutional rights is the answer. A broad application of qualified immunity excuses ignorance of constitutional rights and renders vindication the exception and not the rule. Qualified immunity may serve to defeat liability in an alarming number of instances. But the social costs to the quality of constitutional freedoms are incalculable.

II. THE APPLICATION OF QUALIFIED IMMUNITY HAS BECOME THE RULE AND NOT THE EXCEPTION.

The qualified immunity defense has virtually swallowed the cause of action. Applying the standards argued by the Petitioner, it's a wonder that a civil rights claim could ever succeed. The Petitioner's brief in this case explains very well how broadly qualified immunity has been applied by the lower courts. According to Petitioner, "police officers are ill-equipped to pinch-hit for counsel and cannot be expected to discern whether a statement by this Court was essential to its holding, much less determine that Supreme Court dicta should be ignored in favor of 'binding precedent' of the court of appeals." *See* Pet. Brief at 39. The Petitioner argues in effect that the police officer in this case would have to be a legal scholar to objectively know whether his conduct violated constitutional rights. But if this is true, then only legal scholars could ever be liable for constitutional violations. Public officials are not legal scholars, and the ability to enforce

and vindicate constitutional rights cannot be limited to those claims brought against law professors at state universities. In order to be knowledgeable about constitutional rights, law enforcement officers receive training by lawyers capable of making fine legal distinctions. Based upon this training, law enforcement officers should be presumed to know the law.[10]

> Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Owen v. City of Independence, supra at 655.

The Petitioner asserts that under a substantive due process analysis a constitutional violation requires a balancing of interests which forecloses a violation of clearly established rights. According to Petitioner, "[i]n the absence of a *precedent precisely on point*, that hurdle

---

10 The responsibility for keeping abreast of constitutional developments in criminal law rests squarely on the shoulders of law enforcement officials. "Given the power of such officials over our liberty, and sometimes even our lives, this placement of responsibility is entirely proper. Law enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends." *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986). *See also Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988) (Government officials are charged with knowledge of constitutional developments, including all available decisional law), *cert. denied*, 490 U.S. 1075 (1989); *Melton v. City of Oklahoma*, 879 F.2d 706, 731 (10th Cir. 1989) (Officials are presumed to know and abide by the law; qualified immunity will fail even when the official spoke with counsel before taking action), *vacated on other grounds on rehearing en banc*, 928 F.2d 920 (10th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991).

is especially difficult for a plaintiff to surmount in this context because no police officer can be expected to predict with *perfect accuracy* the after-the-fact judgment of the courts." Pet. Brief at 37 (emphasis added). Precedent precisely on point is unnecessary.[11] Perfect accuracy is not required. Common sense is relevant to the inquiry about whether the contours of the right at issue were clearly established. Fair warning is all that is required.[12]

---

[11] Cases need not be "materially similar" to defeat qualified immunity. *Hope v. Pelzer*, 536 U.S. ___, 122 S.Ct. 2508; 153 L.Ed 2d 666 (2002). To defeat qualified immunity, plaintiff must establish that the contours of the right violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The specific action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law. *Id. See also Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."). "The qualified immunity regime of clearly established law should not be held to allow Section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law." *Wood v. Ostrander*, 851 F.2d 1212, 1218 (9th Cir. 1988).

[12] *See Hope v. Pelzer, supra*, 122 S. Ct. at 2516 ("Our opinion in *Lanier* thus make clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances"); *United States v. Lanier*, 520 U.S. 259, 271 (1997) ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"). This Court in *Lanier* also cited a particularly cogent observation from the Seventh Circuit: "[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the official would be immune from

At least some courts have agreed that where a constitutional right depends upon the balancing of interests, a public official cannot be expected to know in advance how those interests will be balanced, and therefore the right is not clearly established for the purpose of imposing liability. Some courts have held that where a balancing of interests is required, the right is rarely clearly established and can rarely be vindicated.[13] The ability to enforce constitutional rights has been severely diminished because of the application of qualified immunity and the frequency

---

damages liability." *Lanier*, 520 U.S. at 271, quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir.1990). *See also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("'when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous preexisting case law is not required to show that the law is clearly established") (*quoting Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993).

[13] A First Amendment violation within the context of employment "requires particularized balancing on the unique facts presented in each case." *Voigt v. Savell*, 70 F.3d 1552, 1560-61 (9th Cir. 1995). Because, under the *Pickering* balancing test, the determination whether an employee's expression is constitutionally protected requires a fact-sensitive, context-specific balancing of competing interests, the law regarding public-employee free speech claims will "rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under Harlow and its progeny." *Brewster v. Board of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 980 (9th Cir. 1998), *citing Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995); *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir.1995); *O'Connor v. Steeves*, 994 F.2d 905, 917 n. 11 (1st Cir. 1993); *Guercio v. Brody*, 911 F.2d 1179, 1183-85 (6th Cir. 1990); *Melton v. City of Oklahoma City, supra*, 879 F.2d at 729; *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Novola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.1986).

with which the balancing of interests is used as a standard. *E.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (applying a Fourth Amendment balancing test to drug testing); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (applying a balancing approach to procedural due process).[14] The application of qualified immunity when balancing is required to determine a constitutional violation is dramatically inconsistent with the broad remedial purpose of Section 1983, and has been broadly criticized. *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261 (1995).

III. BINDING PRECEDENT IN THE SUPREME COURT, LOCAL CIRCUIT COURT OF APPEALS OR DISTRICT COURT DETERMINES WHETHER CONSTITUTIONAL RIGHTS ARE CLEARLY ESTABLISHED.

The Petitioner further asserts that constitutional law is not clearly established because there exists a split in the circuit courts of appeals. Pet. Brief at 40, 43.[15] But

---

[14] *See also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 984-86 (1987) (explaining the Supreme Court's shift toward a balancing approach); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U.L. Rev. 641, 642 (1994) (explaining how the Court has increasingly relied on a balancing methodology).

[15] The role of state decisional law relevant to the qualified immunity inquiry remains unsettled. *See, e.g., Ward v. County of San Diego*, 791 F.2d 1329, 1333 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987) ("the pronouncement of one state court on a constitutional issue does not necessarily shield a government official from liability. . . . [particularly] in light of contrary authority from the federal courts . . . ."). Because state courts seldom examine federal constitutional claims, few federal courts have found state decisional law to be dispositive. *See* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 Ariz. L. Rev. 621 (1993).

if the vindication of constitutional rights is dependent upon unanimity among the circuit courts of appeals, then constitutional rights will rarely be enforceable because a split in the circuits is extremely commonplace. The existence of clearly established law cannot be dependent upon whether a court in a different jurisdiction renders a contrary opinion. The law of other jurisdictions is only relevant to the extent that there exists no authority on the particular question in the Supreme Court, local federal circuit or district court. "*Absent binding precedent*, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir.1989), *cert. denied*, 493 U.S. 1057 (1990) (emphasis added).[16]

The Petitioner argues that "[t]he only precedent of which we are aware that could have alerted

---

[16] *See also Harper v. Campbell*, 943 F.2d 51 (6th Cir. 1991) ("if a district court can cite 'binding precedent by the Supreme Court, its court of appeals, or itself,' it can find a right to be clearly established and deny qualified immunity to the offending official"); *Norfleet v. Arkansas Dep't of Human Services*, 989 F.2d 289, 291 (8th Cir. 1993) ("In the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts"); *Wilson v. Layne*, 526 U.S. 603 (1999) (granting qualified immunity where police allowed media to accompany police search where "[p]etitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely").

petitioner to particular circumstances in which interrogation alone *would* be held to violate the Fourteenth Amendment is *Cooper, supra.*" (Emphasis original). Pet. Brief, at 42. Contrary to the representations of Petitioner, this should have been enough. In this case, the Ninth Circuit law was abundantly clear to anyone but clever lawyers seeking to avoid civil liability for their clients.

In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), an *en banc* panel of the Ninth Circuit ruled explicitly that a statement coerced by police officers need not be actually offered as evidence at time of trial in order to constitute a constitutional violation. *Id.* at 1244.

> Many things are clear in this passage, but in the context of the present case, one is particularly relevant: the due process violation caused by the coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself. . . . The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.

Id. at 1244-45. There is nothing ambiguous about this language. Clearly, Petitioner does not agree with this rule of law, and cites cases from other jurisdictions which might contradict it. But no objective reasonable official could deny that within the Ninth Circuit this rule was clearly established.

Petitioner asserts that *Cooper*, and every other case relied upon by the lower Court, is distinguishable. In part, Petitioner distinguishes *Cooper* because there "[t]he primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own

defense" and second "it was conceded that the officers were not facing exigent circumstances." Pet. Brief, at 42.

Although the Court in *Cooper* considered the Task Force's purpose, nowhere in the opinion is it suggested that this unlawful purpose was the dispositive consideration. To the contrary, in finding that the conduct of the Task Force violated substantive due process, the Court explicitly ruled that the conduct was being measured "against the Constitutional canons of decency and fairness as elaborated in Parts VI and VII, and . . . other relevant considerations which we find aggravating this context." 963 F.3d at 1249. Clearly, this was one but not the only reason or even the primary reason for the Court's ruling.

The Petitioner next asserts that exigent circumstances justified his reckless disregard for Respondent's right to be free from coercion while in great pain, mortally wounded by police officers and dying in the hospital. The alleged exigent circumstances claimed by Petitioner were the need to obtain evidence before Martinez died of his injuries. Pet. Brief, at 34-35. But those circumstances do not justify the failure to give *Miranda* warnings. In *Quarles v. New York*, 467 U.S. 469 (1984), the Court recognized a "public safety" exception to *Miranda*. "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. "We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659. The Court acknowledged that this was a "narrow exception" to the

Miranda rule. *Id.* at 658. *See also Oregon v. Elstand*, 470 U.S. 298, 317 (1985) ("The Court has carefully adhered to this principle [*Miranda*], permitting a narrow exception only where pressing public safety concerns demanded").

Clearly, the public safety exception to *Miranda* does not apply to this case. Martinez was mortally wounded and dying in the hospital. He posed no danger to anyone. Nor did Petitioner believe that he possessed knowledge which could be useful in preventing an immediate danger to others. Notwithstanding Petitioner's efforts to obfuscate the clarity of this narrow exception, Supreme Court jurisprudence on this issue is clearly established and cannot form the basis for qualified immunity.

Martinez was shot multiple times by a police officer. One bullet struck him in the face, damaging an optic nerve and rendering him blind. Another bullet fractured a vertebra, paralyzing his legs. Three more bullets tore through his leg around the knee joint. 270 F.3d at 854. As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview.

> The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. . . . [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more. Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

270 F.3d at 855. Applying existing Ninth Circuit law, no reasonable law enforcement officer could justify this conduct. Common sense and traditional notions of common decency are far more compelling and persuasive than Petitioner's efforts to create fine legal distinctions for every case relied upon by the lower court. The efforts to distinguish *Cooper* and other cases represent a "rigid, overreliance on factual similarity" that this Court rejected just last term in *Hope v. Pelzer*, 122 S. Ct. at 2517. In the case at bar, the Petitioner's conduct was so patently violative of the constitutional right that any reasonable official should have known without additional guidance from the courts that the action was unconstitutional. Petitioner had more than fair warning. *See United States v. Lanier*, 520 U.S. at 271 ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

A broad application of qualified immunity is destructive to the quality of constitutional freedoms and the broad remedial purpose of Section 1983. The enforcement of constitutional rights must be the rule and not the exception.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY L. NEEDLE
Law Offices of Jeffrey Needle
119 First Ave. S.
Suite 200
Seattle, WA 98104-2533
(206) 447-1560
Attorney for Amicus Curiae

October 25, 2002